Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation, et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reversing the district court's denial of Respondent's post-jury verdict motion for judgment as a matter of law, did the Ninth Circuit err in applying a standard of review that does not sufficiently recognize the Seventh Amendment's prohibition against federal courts reexamining facts tried and determined by a jury, and which is in conflict with the standard of review suggested by this Court's authorities, and that applied by other Circuits?

2. Did the Ninth Circuit deprive Petitioners of their Seventh Amendment right to jury trial by improperly reweighing evidence and ignoring evidence upon which the jury based its verdict, in reversing the district court's denial of Respondent's motion for judgment as a matter of law?

3. The Ninth Circuit in this case, pursuant to an increasing and pervasive practice, rendered its decision in an unpublished/not-to-be cited memorandum. In cases like this, in which a court of appeals reverses a district court's judgment entered on a jury verdict, are litigants entitled – based either on constitutional rights of due process and equal access to a fair and open judiciary, or as a matter of acceptable judicial procedure – to a written, published decision?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

John W. Martin, Patricia M. Martin, John W. Martin Construction Company and Kalispell Feed and Grain, Inc.

* The caption includes the names of all parties who participated at trial and on appeal. Claims involving other parties in the district court were either dismissed or bifurcated before trial. There are no parent or subsidiary companies to be listed with Petitioners.

(referred to throughout as "Martins") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unpublished Memorandum opinion is reprinted at page A-3. The Ninth Circuit's unpublished Order amending its memorandum disposition is reprinted at page A-1, and its unpublished Order denying rehearing and rejecting the suggestion for rehearing *en banc* is reprinted at page A-18.

The unpublished Opinion and Order of the United States District Court for the District of Montana, Missoula Division, dated August 17, 1992, is reprinted at page A-11.

JURISDICTION

The Ninth Circuit issued its original Memorandum opinion on April 19, 1994, and petitioners timely filed a petition for rehearing with suggestion for rehearing *en banc* on May 2, 1994. The Ninth Circuit issued its Order amending its April 19 Memorandum on September 7, 1994. The Court's Order denying rehearing was issued September 14, 1994. This Petition is filed within 90 days after September 14, 1994, and is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the Seventh Amendment to the United States Constitution requires a more deferential standard of review than that applied by the Ninth Circuit in reviewing the denial of a post-verdict motion for judgment as a matter of law, under Rule 50 of the Federal Rules of Civil Procedure. The Seventh Amendment provides:

> In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 50 provides, in relevant part:

> **(a) Judgment as a Matter of Law.**
>
> (1) If during trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

* * *

> **(b) Renewal of Motion for Judgment after Trial; Alternative Motion for New Trial.** Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. . . .

This case also involves a due process and equal protection challenge to the Ninth Circuit's actions. The Fifth Amendment provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

This diversity case (28 U.S.C. § 1332) was tried to a jury, with the Honorable Charles C. Lovell presiding at trial. On March 23, 1992, the jury rendered a verdict for Martins, finding Respondent Norwest Bank Kalispell, N.A. ("the Bank") had committed acts of common law constructive fraud and misrepresentation in its dealings with Martins. The jury determined Martins' damages totalled $3,503,715.16. The jury further determined the Bank was not liable for punitive damages.

Following entry of judgment, the Bank timely filed a post-verdict motion for judgment as a matter of law under Rule 50. The Bank contended, *inter alia*, that the jury's verdict was not supported by the evidence.[1] Judge Lovell denied the motion. In doing so, he articulated and applied the following standard of review:

> . . . The Court will grant Defendant's motions "if the evidence construed in the light most favorable to the nonmoving party [Plaintiffs] permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's," and must deny Defendant's motions "if reasonable minds could differ over the verdict." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989). The Court will not substitute its judgment regarding the credibility or weight of evidence for that of the jury.

A-12. Judge Lovell concluded the jury reasonably arrived at its verdict, based on the evidence presented at trial.

On appeal (pursuant to 28 U.S.C. § 1291), the Ninth Circuit articulated and applied a less deferential, substantial evidence standard of review:

> We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S.Ct. 815 (1992). Our role is the same as the district court's.

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[1] The Bank also challenged the jury's damages determinations and the District Court's award of attorneys' fees to Martins in both its post-verdict motion and on appeal. The Ninth Circuit never reached those matters and they are not at issue in this Petition.

> *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S.Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

A-4. The Ninth Circuit reversed in a short, not-for-publication memorandum, which it slightly modified following Martins' petition for rehearing. A-1. The Ninth Circuit concluded the jury's verdict was not supported by substantial evidence, and directed entry of judgment for the Bank.

The evidence, briefly summarized, established that the Bank for several years had financed a feed and grain business owned by Lee Tower and known as Kalispell Feed and Grain Montana (KFG). By 1980, it was apparent KFG could not meet its debt obligations to the Bank. The KFG debt was partially guaranteed by Farmers Home Administration (FmHA) and was secured by the KFG physical plant and equipment. KFG's inability to meet its debt obligations troubled the Bank, because the Bank was undersecured and considered the loan "bad." Throughout 1980, FmHA advised the Bank to prepare liquidation plans and that foreclosure was imminent. If the Bank had foreclosed at that time, it could have lost approximately $400,000 to $500,000.

In early 1981, Petitioner John Martin entered the picture and expressed an interest in acquiring KFG for

investment purposes only. A series of negotiations between and among Martin, Tower and the Bank ensued. These negotiations, and critical material the Bank withheld from Martin during negotiations, provided the basis for Martins' claims against the Bank.

Tower instructed the Bank to give Martin whatever information Martin needed. Tower then retreated to a "back seat" position in the negotiations; the Bank handled the transaction from that point forward. In April of 1981, after he had acquired what he had been led to believe was all the relevant information on the business within the Bank's knowledge, Martin agreed with the Bank to assume all of Tower's outstanding obligations. Martin also personally guaranteed the loans, and pledged significant collateral – his two personal homes – to secure the loans. With Martin and his collateral on the hook, the Bank was fully secured in the event of a failure of the business.

Two years after Martin's acquisition of KFG, the Bank pulled Martin's line of credit, knowing this would topple the business. Martin had injected nearly $700,000 cash trying to keep the business afloat before the Bank eventually foreclosed. The jury determined the Bank had failed to give Martin important information that led him to invest in the business and protect the Bank from loss through his guarantees and collateral. In denying the Bank's post-verdict motion for judgment as a matter of law, Judge Lovell noted that the verdict "demonstrates the jury's understanding of an important principle which [the Bank] apparently fails to understand – [the Bank] cannot profit from its wrongful acts by recovering debts which [Martins] were fraudulently induced to incur." A-16.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Approach In This Case and Other Recent Cases Does Not Sufficiently Protect Litigants' Seventh Amendment Rights, and it Conflicts with the Standard of Review Suggested by This Court's Authorities, and Applied by Other Circuits Under Rule 50.

It is settled that Rule 50(b) does not *per se* violate the Seventh Amendment right to a jury trial. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967). It is equally clear, however, that Seventh Amendment concerns significantly circumscribe and limit federal courts' authority to interfere with jury determinations. *See, e.g., Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) ("[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "); *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("[I]t would be an undue *invasion of the jury's historic function* for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.") (emphasis added).

There is, however, confusion throughout the federal court system with respect to the proper standard and scope of review to be applied under Rule 50. This Court has, in a number of cases, articulated and applied a very deferential standard, which protects a jury's determination. In *Lavender*, for example, this Court stated:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, *it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*

327 U.S. at 653 (emphasis added). Similarly, in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), the reviewing court's role is defined:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Moreover, this Court has indicated the scope of the evidence to be considered in determining whether there is sufficient evidence for a jury is limited " . . . only to the evidence and reasonable inferences which tend to support the [non-moving party's case.]" *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949).

While some commentators and lower courts have suggested these standards apply only in cases under the Federal Employers Liability Act and Jones Act, this Court has indicated they represent the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 445 n. 8 (1959); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n. 6 (1962) (citing *Tennant* as indicating the rule on appellate review of a jury verdict). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2526 (1971).

This Court has not recently visited this issue. In the absence of clear guidance, the lower courts have adopted a variety of approaches. Some are consistent with the principles articulated by this Court. For example, the Eighth Circuit recently articulated the applicable standard as follows:

> We review the grant of a motion for judgment as a matter of law under the same standard as that for a motion to direct the verdict. A motion for judgment as a matter of law should be granted " 'when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.' " *Dace v. ACF Industries, Inc.*, 722 F.2d

> 374, 375 (8th Cir. 1983), *op. adhered to as supplemented by* 728 F.2d 976 (8th Cir. 1984) (quoting *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir. 1975).

Ehrhardt v. Penn Mut. Life Ins. Co., 21 F.3d 266, 269 (CA8 1994). Thus, if there is any evidence upon which the jury's verdict reasonably could be based, the verdict is not to be upset. And, in reviewing the Rule 50 motion, "the court must assume that all of the evidence supporting the party opposing the motion is true, and . . . give that party the benefit of all reasonable inferences from that evidence. The case may be taken from the jury only if no rational jury could find against the moving party on the evidence so viewed." *Dace, supra*, 722 F.2d at 376 (relying on *Wilkerson v. McCarthy*). *See also, e.g., Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 351 (CA4 1994) (articulating and applying very deferential standard of review under Rule 50). *See generally* 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.02, 3.03 (2nd ed. 1992); 9 WRIGHT & MILLER, *supra at* §§ 2524-2529 (1971).

In contrast, the Ninth Circuit, in this case and others, has applied the less deferential, "substantial evidence" standard, which examines the evidence as a whole and not just that supporting the verdict. A-4; *Erickson v. Pierce County*, 960 F.2d 801, 804 (CA9), *cert. denied*, 113 S.Ct. 815 (1992); *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. LEXIS 1926 (CA9 Jan. 26, 1994), *cert. denied*, 63 U.S.L.W. 3262 (1994) (reversing Montana district court judgment entered on substantial jury verdict for plaintiff, on punitive damages, based on lack of substantial evidence under *Erickson* standard of review); *House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. LEXIS 22199 (CA9 Aug.

15, 1994) (reversing Montana district court judgment entered on substantial jury verdict for plaintiff, based on lack of substantial evidence under *Erickson* standard of review).[2] This standard, as articulated and applied, necessarily engages the Court in reweighing and reassessing the evidence and inferences that support and oppose the jury's verdict.

This Court has implicitly rejected the "substantial evidence" test of sufficiency. *See Lavender*, 327 U.S. at 743 (rejecting and reversing lower court's determination that there "was no substantial evidence" to support the submission of the case to the jury); *Tennant*, 321 U.S. at 410 (reversing court of appeals' determination of "no substantial proof").

Thus, the proper standard of review under Rule 50 remains unsettled. This is a matter of significant, practical importance, with constitutional implications; it is not a matter of mere semantics or academic interest. *See Schwimmer v. Sony Corporation*, 459 U.S. 1007, 1009 (1982) (Opinion of White, J., respecting denial of certiorari) ("Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the Federal Courts of Appeal is of far more than academic interest."). *See also* WRIGHT & MILLER, *supra*, § 2525, at 556 ("It is extremely important to know whether the [FELA] decisions are confined to the

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[2] Neither Martins nor the Bank relied upon *Erickson's* substantial evidence test in their briefs to the Ninth Circuit. Both parties correctly articulated a more deferential standard of review. *See* Brief of Appellant, dated Sept. 1, 1993, at pp. 20-21; Brief of Appellees, dated Oct. 20, 1993, at pp. 19-20.

particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts.").

If review is granted in this case, Martins will demonstrate on full briefing that by its approach the Ninth Circuit improperly weighed and reconsidered evidence, and ignored evidence and reasonable inferences supporting the jury's verdict.[3] For example, the Court of Appeals determined Martins failed to prove the Bank had "created a false impression, or by its words or conduct misled [Martins]," so the evidence was "insufficient to support [the] constructive fraud claim." A-1, A-2. In arriving at this factual determination, the Court necessarily ignored or rejected evidence, and reasonable inferences therefrom, that established for the jury that the Bank created a false impression about the prospects for FmHA financing and the financial viability of the business Martins acquired. In doing so, the Ninth Circuit exceeded its

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[3] The Court of Appeals also ignored the district court's conclusion that the jury's verdict was supported by the evidence and inferences. *Cf. Dick, supra,* 359 U.S. at 447 ("After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct and that reasonable men could conclude [as they did]."); *Brinkley-Obu, supra,* 36 F.3d at 351 (noting, in articulating standard of review, that "[b]oth the jury and the district court concluded there was sufficient evidence to support a verdict in the plaintiff's favor.").

proper role, and infringed on Martins' Seventh Amendment rights – as a direct result of its misapplication of the proper standard of review under Rule 50.

The Ninth Circuit, and other lower courts, have adopted and applied standards for reviewing motions for judgment as a matter of law that conflict with this Court's authorities and the protection guaranteed under the Seventh Amendment. The confusion and conflicting approaches in the lower courts is pervasive. The Court should grant certiorari to review and clarify the law in this important area.

II. The Questions Presented Are Important.

A. The Proper Relationship Between Rule 50 and the Seventh Amendment is a Recurring, Vitally Important Issue to Litigants throughout the Federal Court System.

In virtually all cases tried to a jury, defense counsel move for judgment as a matter of law at some point in the trial. In many cases, that motion is renewed after an unfavorable (plaintiff's) verdict. Thus, the proper standard of review for such motions is a matter of widespread and significant application. This Court has not addressed this issue in recent years, and its earlier authorities have resulted in confusion and disagreement in the lower courts. Given the important constitutional issue at stake, guidance and instruction from this Court is needed.

This issue has become particularly acute in recent months for Montana litigants. In addition to the present

case, the Ninth Circuit has reversed, on substantial evidence grounds, two other cases in which juries have rendered plaintiffs' verdicts in cases involving commercial torts. *See House of Stuart* and *Coddington, supra.* In each case, the Court of Appeals has engaged in a searching reexamination and reweighing of evidence, to reverse the findings of the juries (each of which had survived post-verdict motions for judgment as a matter of law).

This case provides an important opportunity for this Court to clarify the correct relationship between the Seventh Amendment and Rule 50.

B. This Court Should Exercise its Supervisory Powers to Provide Guidance Regarding the Courts of Appeals' Pervasive Use of Unpublished, No-Citation Opinions When Reversing Judgments from the District Courts.

As discussed elsewhere in this Petition, the Ninth Circuit's decision was wrong. Significantly, that decision resulted from a flawed and unfair appellate process: adjudication through an unpublished/no-citation memorandum decision. By its nature, this process involves less rigorous appellate review than that which goes into a published decision.

Unpublished/no-citation opinions legitimately and necessarily have a place in our busy federal judicial system. Because of the important federal constitutional right to a trial by jury, however, they should not be permitted in cases, like this, where the appellate court reverses a judgment entered on a jury's verdict.

This Court has recognized it is vitally important that our judicial system operate in the open. *See, e.g., Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Nixon v. Warner Communications,* 435 U.S. 589 (1978). As the Seventh Circuit recently noted, in construing this Court's authorities on the public's access to court proceedings, "Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (CA7 Cir. 1994).

Correspondingly, in our appellate system, the court's opinion serves "three critical purposes. First, litigants and the public are assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces the decisionmaking and ensures correctness. Third, appellate opinions are the lifestream of the common law, for they create precedents." T. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS, 119-120 (1994).

Thus, Justice Brennan's words about the importance of open trials apply as well to the importance of an open and fair appellate system:

> [I]t is a means of meeting "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' " . . . For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are

> governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation . . . and the Equal Protection Clause. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. . . .
>
> Secrecy is profoundly inimical to this demonstrative purpose of the [judicial] process.

Richmond Newspapers, Inc., supra, 448 U.S. at 594-95 (Brennan, J., concurring) (citations omitted).

In recent years, the courts of appeals have increasingly rendered their decisions in the form of unpublished/no-citation opinions, pursuant to non-uniform circuit rules.[4] *See* RATIONING JUSTICE ON APPEAL, *supra* at pp. 125-35; MANAGING APPEALS IN FEDERAL COURTS, pp. 455-534 (FED. JUD. CENTER 1988); ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. This trend undermines the openness, fairness and integrity of the judicial process. It has created a "two-tracked system," RATIONING JUSTICE ON APPEAL, *supra* at 130, which can result in the "denial of equal justice." James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (Oct. 1975).

It is commonly acknowledged, by judges as well as commentators, that writing an opinion for publication requires greater care and attention, and results in better

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[4] Each Circuit has adopted a rule regarding publication and citation of opinions. *See* 1ST CIR. R. 36.2; 2ND CIR. R. 0.23; 3RD CIR. R. 5.5 - 5.6; 4TH CIR. R. 36.4 - 36.6; 5TH CIR. R. 47.5; 6TH CIR. R. 10(F) and R. 22; 7TH CIR. R. 53; 8TH CIR. R. 47B and R. 28A(K); 9TH CIR. R. 36-2 - 36-3; 10TH CIR. R. 36; 11TH CIR. R. 36-1 and 36-2; D.C. CIR. R. 11(C) and 14; FED. CIR. R. 47.8.

decisionmaking. Judge Reinhardt, of the Ninth Circuit, candidly spoke to the pernicious effects of the increasing trend toward unpublished memorandum dispositions:

> Those who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for "expediting" cases, procedures that ensure that individual cases will get less attention. . . . [W]e now all too often give cases second-class treatment. We merely look at the files and then issue unpublished memorandum dispositions or orders.
>
> The use of these makeshift procedures ensures that many cases do not get the full attention they deserve, and the quality of our work suffers.

Stephen Reinhardt, *A Plea to Save the Federal Courts – Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (Jan. 1993). Judge Wald, of the D.C. Circuit, has noted that the unpublished opinion process "has an obvious bearing on judicial accountability. Although unpublished opinions may indeed save time, they limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts." Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 783 n. 41 (1983). Further, she cautioned that appellate judges "must take care . . . that their reactions to a stepped-up work load do not corrode the essence of their judicial functions – reading and listening to the arguments of the parties, being familiar with the record, making and explaining their decisions *generally for publication*. Taking shortcuts in any of these areas is a danger signal

for the process. . . . " *Id.* at 785-86 (emphasis added). In dissenting from the adoption of the Tenth Circuit's no publication/no citation rules, Judge Holloway recently cautioned:

> [T]he basic purpose for stating reasons within an opinion or order must never be forgotten – that the decision must be able to withstand the scrutiny of analysis . . . as to its soundness . . . and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

In Re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (CA10 1992) (Holloway, J., dissenting).

The increasing use of unpublished opinions has also been the subject of extensive study and commentary, which has "largely been negative." Baker, *supra* at 130. Professor Baker's 1994 report for the Justice Research Institute notes, for example, "In a profession that judges itself by the appearance of impropriety, limited publication appears at odds with accepted appellate tradition. Suspicions and accusations that judges are being less than diligent or are giving some appeals less than their due spring to mind, if not to reality." *Id.* In 1988, the Federal Judicial Center republished a comprehensive study by Professors Reynolds and Richman, in which they conclude:

> The discipline of providing written reasons . . . often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate

> result. * * * Far and away the major problem we have identified in connection with limited publication is that created by opinions that do not satisfy minimum standards. Such opinions do not give the appearance that justice has been done. More important, perhaps, shoddy opinions may reflect the quality of thought that went into the decision itself.

MANAGING APPEALS IN FEDERAL COURTS, *supra* at 470, 485 (republishing William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981)).

The parties below actively litigated this case for approximately three years before trial. They went through extensive discovery and pretrial proceedings. They prepared for and tried the case to a jury over six days of trial. On March 23, 1992, the jury rendered its verdict for Martins, and determined their damages totalled in excess of $3 million. Extensive post-trial motions were filed, briefed and argued. The district court judge who had presided throughout pretrial and trial proceedings considered those motions and rendered written decisions.

On appeal, the issues were thoroughly briefed. The parties' attorneys travelled several hundred miles and presented their arguments to a panel of the Ninth Circuit on March 11, 1994.

After all this, the Ninth Circuit issued its cursory, unpublished memorandum, reversing the judgment below. A-3. In doing so, the Court of Appeals rejected the

considered judgment of Judge Lovell and the factual determinations of the jury.

Petitioners, in seeking rehearing, pointed out that the memorandum disposition misapplied controlling law on constructive fraud, in conflict with a published opinion of the Ninth Circuit. Further, the Court had ignored and misconstrued important evidence. Recognizing it had erred, the Court of Appeals modified its memorandum by adding new, unfounded factual determinations, but ignoring the misstated (and conflicting) legal principles. A-1.

Martins' federal constitutional right to a jury trial is adversely affected by the Court of Appeals' decision. With this important constitutional right at stake, they are entitled to due process and equal protection under the Fifth Amendment. *Cf. Evitts v. Lucey*, 469 U.S. 387, *rehearing denied*, 470 U.S. 1065 (1985) (even though states may not be required to create an appellate system, any appellate system that is created must comply with principles of due process); *Griffin v. Illinois*, 351 U.S. 12, *rehearing denied*, 351 U.S. 958 (1956) (state had to provide transcripts to criminal defendants who could not afford to pay for them, in order to protect a sufficient level of equal justice).

The Ninth Circuit's publication rules (CIRCUIT RULES 36-1 - 36-6), on their face and as applied, do not require that written, published opinions be rendered where the court reverses a judgment entered on a jury verdict. In such cases, a full published opinion should be required. *See* FEDERAL JUDICIAL CENTER, *supra at* 490-91 (proposing a Model Rule for publication criteria, including cases in

which the court of appeals reverses the judgment below, except in limited circumstances). By arbitrarily classifying this case as unworthy of the more rigorous published opinion process, the Court of Appeals has deprived Martins of due process and equal protection under the Fifth Amendment.

Even if the Court were not to agree that the unpublished opinion process implicates constitutional issues, the matter is certainly of sufficient importance to warrant the Court exercising its power of supervision under Rule 10.1(a). *Cf. Thermtron Products v. Hermansdorfer,* 423 U.S. 336 (1976) (construing power of federal district court to deny removal from a state court because the district court's docket was too heavy). The unpublished opinion criteria and practices in the courts of appeals vary widely across and within circuits. This "patchwork system is unsatisfactory and it has been tolerated too long. Standards are necessary." *Baker, supra at* 133.

This case is particularly appropriate for an examination of these important issues. The Ninth Circuit's decisionmaking process and result demonstrate the problems with unpublished opinions.[5] It conceded error in its initial memorandum by subsequently issuing an order modifying the

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[5] Given the constitutional and serious financial interests at stake, and all that went into preparing for trial and appeal, Martins reasonably believe they received the "second-class treatment" about which Judge Reinhardt candidly wrote. S. Reinhardt, *A Plea to Save the Federal Courts, supra,* p. 52. Moreover, the Ninth Circuit has recently used the same unpublished/no-citation process to take away, on substantial evidence grounds, substantial jury verdicts from Montana in *House of Stuart, supra* and *Coddington, supra.* These opinions

memorandum. The modification compounded the Court's error by ignoring pertinent law and facts. If the Court of Appeals were required to undertake the more rigorous and effective process of preparing a published opinion, the result would change.

Additionally, the procedural history (jury verdict affirmed by district court and reversed on appeal) provides an appropriately narrow context within which to examine and articulate standards for when publication is required – as a matter of constitutional right and/or to protect and preserve the integrity of the judicial process. For these reasons, this Court should grant Martins' petition for certiorari.

III. The Decision of the Court of Appeals is Erroneous.

Martins pointed out in their petition for rehearing that the Court of Appeals erred in its articulation of the substantive law governing constructive fraud. In particular, the Court incorrectly stated, "Constructive fraud, like negligent misrepresentation, requires a factual showing that the claimed representations were false." A-9-A-10. This proposition contradicted the stipulated jury instructions, as well as a prior opinion of the Ninth Circuit, *In Re Mediscan Research, Ltd.*, 940 F.2d 558 (CA9 1991). In truth, concealed facts that may create a false impression are sufficient to form a basis for constructive fraud.

This legal error was particularly important. In reweighing the evidence upon which the jury had based

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certainly do not "give the appearance that justice has been done." MANAGING APPEALS IN FEDERAL COURTS, *supra* at 485.

its verdict, the Ninth Circuit emphasized throughout its original opinion that, based on its own review of the evidence, Martins had failed to prove the Bank had made false statements of fact. The Ninth Circuit obviously did not consider whether the jury reasonably could have concluded Martins had been given a false impression or otherwise misled by the Bank.

Martins further pointed out that the Court of Appeals erred in its standard of review by improperly ignoring evidence and reasonable inferences supporting the jury's verdict, and independently judging the credibility of witnesses and the weight of the evidence. Taken together, the Court of Appeals' mistakes of law and fact led it to a wrong decision.

The Court of Appeals acknowledged it had erred by issuing its September 7, 1994 Order, modifying its memorandum disposition. A-1. In doing so, however, it only compounded its errors.

The Ninth Circuit's decision cannot be reconciled with the record, as Martins will demonstrate upon full briefing. Moreover, the court below violated principles governing the correct standard of review under Rule 50. Further, its decisionmaking process was constitutionally infirm or, at the very least, so far departed from acceptable standards of appellate judicial proceedings that this Court should exercise its supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 13th day of December, 1994,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL ORDER (Filed Sept. 7, 1994)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted March 11, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON, Circuit Judges.

The memorandum disposition filed April 19, 1994, shall be amended by replacing the last full paragraph on page 8 with the following:

> Because Martin failed to prove that Norwest made false representations, created a false impression, or by its words or conduct misled

Martin, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion should have been granted.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL MEMORANDUM* (Filed Apr. 19, 1994)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted March 11, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON, Circuit Judges.

John W. Martin Construction Company, Inc., Kalispell Feed and Grain, Inc. of Arizona, and John and

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Patricia Martin (collectively "Martin") brought this misrepresentation and fraud action against Norwest Bank Kalispell, NA ("Norwest") after Norwest cut off Martin's line of credit for Kalispell Feed & Grain Supply, Inc. ("KF&G"). The issues are whether the district court erred by denying Norwest's motion for judgment as a matter of law on Martin's negligent misrepresentation and constructive fraud claims and on the compensatory damages and emotional distress awards, and by awarding attorney's fees to Martin. The district court's jurisdiction was based upon 28 U.S.C. § 1332. We have jurisdiction to review pursuant to 28 U.S.C. § 1291, and we reverse.

I.

We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). Our role is the same as the district court's. *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

We conclude that the evidence is insufficient to support the finding of negligent misrepresentation. Therefore, the district court erred by denying Norwest's

motion for judgment as a matter of law on Martin's negligent misrepresentation claim.

Martin was required to prove that:

a) the defendant made a representation as to a *past* or *existing* material fact;

b) the representation was untrue;

c) the defendant made the representation without any reasonable ground for believing it to be true;

d) the representation was made with the intent to induce the plaintiff to rely on it;

e) Martin was unaware of the falsity of the representation and must have acted in justifiable reliance on it;

f) as a result of that reliance, Martin sustained damage.

Kitchen Krafters, Inc. v. Eastside Bank of Montana, 789 P.2d 567, 573 (Mont. 1990).

At trial, Martin argued that Norwest misrepresented the prospects of KF&G obtaining FmHA-guaranteed financing, the value of KF&G, KF&G's financial needs, and KF&G's potential. We have examined the evidence supporting each of these theories in the light most favorable to Martin, and find it insufficient.

1. Denial of FmHA Application

At trial, Martin sought to establish that Norwest had deliberately not told Martin that the FmHA loan application had been denied, and that further applications

would be denied as well, because Norwest wanted to induce Martin to inject equity into KF&G and to pledge his homes as collateral.

Prior to FmHA's final denial on February 27, 1981, Norwest clearly stated that it would "continue to pursue the present request for a $810,000 FmHA guaranty loan," but that "it would have to be understood that the proposal as it now exists would have to be amended."

Martin testified at trial that prior to entering into the purchase and sale agreement, he knew that the FmHA application by KF&G had been turned down [in December]. White and former owner Tower testified that KF&G was sold to Martin only because the application had been rejected. Martin's testimony also showed that he understood that a new FmHA application would have to be made. Thus, even if Norwest did not tell Martin that KF&G's earlier FmHA application made by Tower had been rejected for the second time, Martin clearly had been told that the application had been rejected initially by White before Martin purchased the company.

Martin does not point to evidence showing that Norwest knew that future applications would be denied. In fact, FmHA's letters suggested that an application would be granted if capital were infused from another source. To the extent that Norwest stated that the loan application would be pursued, and, with Martin's financial statement, should be approved, Norwest did not represent any *past* or *existing* fact. *Kitchen Krafters*, 789 P.2d at 573.

2. Replacement Cost Appraisal

Martin relies upon evidence that a bank representative handed him a copy of the 1980 FmHA loan application and stated, "Here's what you're buying." The loan application contained an appraisal showing a replacement cost value of $2,218,400. Construing the evidence in the light most favorable to Martin, Olson's statement and Norwest's signature on the application are arguably enough to attribute the representation to Norwest. However, Olson's statement is not evidence that Norwest represented the appraisal as something other than a replacement cost appraisal. The appraisal clearly stated that it was based upon replacement cost.

Martin was required to show that a representation of Norwest was false. *See Batten v. Watts Cycle and Marine, Inc.*, 783 P.2d 378, 381 (Mont. 1989), *cert denied*, 494 U.S. 1087 (1990). At trial, Martin presented correspondence between Norwest and FmHA that had not been given to Martin in which both expressed concern that a forced sale, in light of the then-extremely high interest rates, would result in a loss as the property would sell at "less than the true value of the assets" – approximately $1.5 to $1.6 million. This evidence does not indicate that the replacement cost appraisal was incorrect or that Norwest falsely represented the value of the company as a going concern. There is no evidence that Norwest made any representation of the liquidation value of the company.

3. Statements Regarding KF&G's Need for Funding

Martin argued at trial that Norwest had falsely told him that KF&G needed only $500,000, when, in fact, FmHA had estimated that a minimum of $1 million was necessary to finance the operation. FmHA again informed Norwest by telephone on February 5, 1981, that at least $1 million was needed, $500,000 of which must be in the form of equity. On February 6, 1981, Norwest stated in its Letter of Intent that it had requested the injection of $500,000 in equity because FmHA thought that it was necessary in order for FmHA to entertain a request for an additional $500,000.

These facts do not show that Norwest misrepresented KF&G's needs. KF&G asked for $810,000 in July 1980. FmHA found that this would not be enough for KF&G, "especially if significant increases in sales [were] projected." FmHA concluded that KF&G needed at least $1 million in working capital. "To have a reasonable chance of approval [of the FmHA guaranty application], at least $1 million is needed, $500,000 of which must be in the form of equity." That is, FmHA informed Norwest that KF&G needed an equity injection of $500,000 and a loan of at least $500,000 to have enough working capital. The clear meaning of FmHA's letter was that an application for $500,000 would have "a reasonable chance of approval" if $500,000 were injected independently. Norwest's Letter of Intent stated this rather clearly. Martin did not prove that there was any misrepresentation about KF&G's funding needs, on which Martin could have relied.

4. Viability

In its Letter of Intent, Norwest stated that "under proper conditions," KF&G was "a viable company that could show a profit." This statement was clearly conditional, and does not represent a past or existing material fact, which is the first element of negligent misrepresentation. *See Kitchen Krafters,* 789 P.2d at 573.

Martin also failed to prove that he relied on this statement. Martin's testimony makes clear that he understood the conditional nature of the statement, and, thus, that he did not rely on the statement. He testified that he understood the letter to mean that having a line of operating credit would be the proper condition referred to by Norwest, and would be necessary for KF&G to make a profit.

II.

Norwest also moved for judgment as a matter of law on Martin's constructive fraud claim, but the district court denied the motion.

"Constructive fraud occurs when a party to a transaction conceals from the other party material facts about the nature of the transaction." *Mends v. Dykstra,* 637 P.2d 502, 506 (Mont. 1981) (internal quotation omitted). It consists of a breach of duty that gains an advantage to the person in fault by misleading another to his prejudice, or of any act or omission that the law specially declares to be fraudulent. *Id.* at 505-6; *Bottrell v. American Bank,* 773 P.2d 694, 706 (Mont. 1989). Constructive fraud, like negligent misrepresentation, requires a factual showing that the

claimed representations were false. *Batten*, 783 P.2d at 382. Both torts also require that the plaintiff did not know the truth regarding the matters allegedly misrepresented. *Id.* at 381.

Because Martin failed to prove that Norwest made false representations, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion should have been granted.

III.

Because we conclude that the evidence does not support the jury's verdict of liability, the compensatory damages and emotional distress awards must be vacated.

IV.

The district court awarded $421,307.26 to Martin for attorneys' fees and expenses. Because we hold that Norwest is not liable for negligent misrepresentation or constructive fraud, Martin is not the prevailing party on any claim and is not entitled to fees under any theory.

V.

The judgment of the district court is **REVERSED** and the case is **REMANDED** for entry of judgment for the defendant consistent with our opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation, KALISPELL FEED AND GRAIN, INC., an Arizona corporation, JOHN W. MARTIN, individually, and PATRICIA M. MARTIN, individually,

Plaintiffs,

-v-

NORWEST BANK KALISPELL, N.A., a national banking corporation,

Defendant.

and

NORWEST BANK OF KALISPELL, N.A., a national banking association,

Counterclaimant,

-v-

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation, JOHN W. MARTIN, individually, and PATRICIA M. MARTIN, individually,

Counterclaim Defendants.

CV 85-147-M-CCL

OPINION AND ORDER

(Filed Aug. 17, 1992)

* * *

Defendant Norwest Bank Kalispell renews its motion for judgment as a matter of law, originally made at the close of the evidence in this case, on the grounds that there is no legally sufficient evidentiary basis for a reasonable jury to have found in favor of Plaintiffs on Plaintiffs' claims. Defendant also contends that there is no legally sufficient evidentiary basis for a reasonable jury to have found the damages which the jury awarded. Defendant also asks the court to alter or amend its award of attorneys' fees, on the grounds that there is no legal or evidentiary basis for such an award. Plaintiffs oppose Defendant's motions. Having considered the arguments of the parties and its recollection of the record of this trial, the court is now prepared to rule.

A. Standard of Review.

Defendant's motion for judgment as a matter of law is governed by Fed. R. Civ. P. 50, which was amended in December of 1991. The parties agree that the court should decide this motion according to the standards for judgment notwithstanding the verdict articulated by existing case law under Rule 50 as it existed prior to its amendment. The court will grant Defendant's motions "if the evidence construed in the light most favorable to the nonmoving party [Plaintiffs] permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's," and must deny Defendant's motions "if reasonable minds could differ over the verdict." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 181 (9th Cir. 1989). The court will not substitute its judgment regarding the credibility or weight of evidence for that of the jury.

B. Negligent Misrepresentation and Constructive Fraud.

Defendant argues that the contentions identified by Plaintiffs as the bases for their claims of misrepresentation and constructive fraud either provide no basis for those claims as a matter of law, or are not supported by substantial evidence of record. Plaintiffs respond that the evidence, when viewed in its entirety, supports the jury's verdict.

Defendant raised many of these same arguments in its motion for summary judgment as to Plaintiffs' negligent misrepresentation and constructive fraud claims. In denying Defendant's motion for summary judgment, the court noted that Plaintiffs raised a disputed issue of material fact as to whether Defendant made statements which created a false impression concerning the viability of Kalispell Feed and Grain Supply, Inc. (KFG), which gave rise to a duty to disclose material factual information to Plaintiffs. The court also noted that Plaintiffs raised a factual issue as to whether Norwest misrepresented KFG's value by allegedly endorsing an appraisal which overstated KFG's value. May 28, 1991, opinion and order at p. 12.

1. Constructive Fraud.

When viewed in the light most favorable to Plaintiffs, the evidence at trial supported Plaintiffs' contentions of constructive fraud. The evidence demonstrated that Defendant participated in the negotiations which led to Plaintiffs' purchase of KFG. Defendant represented that KFG was a viable business and provided an application

for an FmHA guaranty which included an appraisal showing KFG to have substantial equity. Defendant represented that it would pursue the guaranty from the FmHA.

Defendant, which was authorized to provide Plaintiffs with all the financial information about KFG which was in Defendant's possession, did not inform Plaintiffs of a number of material facts, including the following: 1) the FmHA had refused the guaranty application and turned down the appeal request; 2) the FmHA had indicated that it would not consider guaranteeing the requested $810,000 loan unless a large amount of equity was injected into KFG; 3) certain FmHA officials believed that KFG should be liquidated; and 4) FmHA officials believed that KFG's liquidation value was not sufficient to cover KFG's debts.

The failure to disclose material facts does not, by itself, rise to the level of actionable fraud. However, "a pattern of repeated concealments of the true state of affairs concerning the condition of a [business] and probable business earnings" may result in a finding of constructive fraud. *Moschelle v. Hulse*, 190 Mont. 532, 622 P.2d 155, 159 (1980). It was reasonable for the jury to decide, based on this evidence presented at trial, that Defendant had a duty to disclose the facts necessary to "erase the false impressions" it had created in Plaintiff's mind. *Id.* The jury's finding that Defendant committed an act of constructive fraud by concealing the facts necessary to provide Plaintiffs with a complete and accurate picture of KFG's viability is supported by substantial evidence.

2. Negligent Misrepresentation.

Defendant argues that any misrepresentations about the value and the viability of KFG which it made cannot support a finding of negligent misrepresentation because Defendant was expressing an opinion and not stating a representation of material fact. Defendant cites *Dolson Co. v. Imperial Cattle Co.*, 624 P.2d 993 (Mont. 1981) to support its contention that the court should determine as a matter of law that statements about KFG's value constitute opinions rather than factual representations. While it is true that the district court made that determination in *Dolson*, the court was acting as a finder of fact at the time. The Montana Supreme Court affirmed the district court's decision, noting that the finder of fact is in the best position to "assess the credibility of witnesses, and conclude whether the statements regarding value constitute fact or opinion." *Id.* at 996.

In this case the jury was the finder of fact. The jury found that Defendant made negligent misrepresentations of fact to Plaintiffs. That determination is supported by substantial evidence, and will not be set aside.

C. Damages.

Defendant contends that it is entitled to judgment as a matter of law with respect to that portion of damages which was awarded to offset the debt owed by Plaintiffs to Defendant because there is no factual or legal basis for such an award. The jury was instructed, with the consent of all parties, that it should award damages for any injuries caused by Defendant's negligent misrepresentation and constructive fraud. In his closing argument,

Plaintiff's counsel argued that Defendant's acts of constructive fraud and negligent misrepresentation caused Plaintiffs to purchase KFG and incur the debts in question. Defense counsel did not object to this argument, and deliberately chose not to argue damages during his own closing.

The jury verdict demonstrates the jury's finding that Plaintiffs would not have incurred the debt in question but for Defendant's negligent misrepresentation and constructive fraud. That finding is supported by substantial evidence. The verdict also demonstrates the jury's understanding of an important principle which Defendant apparently fails to understand – Defendant cannot profit from its wrongful acts by recovering debts which Plaintiffs were fraudulently induced to incur.*

Defendant also argues that it is entitled to judgment as a matter of law as to Mr. Martin's award of damages in the amount of $250,000 for emotional distress. The court carefully considered this issue prior to instructing the jury as to emotional distress damages, recognizing its "duty to determine the threshold question of whether any proof of such severe emotional distress exists sufficient to

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* Defendant's counsel acknowledged during the jury instruction conference that a verdict in favor of any plaintiff as to the constructive fraud claim would prevent Defendant from pursuing its debt claim against said plaintiff. The court attempted in its instructions to clarify this point for the jury by informing the jury of the amount that Defendant would recover if Defendant prevailed in its debt claim. Defendant raised no objection to this portion of the instructions and failed to object to Plaintiffs' damage calculations during Plaintiffs' closing argument.

raise a question of fact for the jury." *First Bank (N.A.) v. Clark*, 236 Mont. 195, 771 P.2d 84, 91 (1989). There was sufficient evidence in the record to satisfy the threshold inquiry and to support the jury verdict.

D. Attorneys' Fees.

Defendant asks the court to alter or amend its award of attorneys' fees to Plaintiffs on the grounds that Plaintiffs failed to establish the legal and evidentiary basis for such an award. Rather than raising any new argument on this issue, Defendant summarizes its prior argument and incorporates its prior brief. The court carefully considered Defendant's argument prior to granting Plaintiffs' motion for attorneys' fees. The reasons given for that award in the court's May 29, 1992, opinion and order remain valid, and Defendant's motion to alter or amend is without merit.

In accordance with the forgoing,

IT IS HEREBY ORDERED that Defendant's motions for judgment as a matter of law and to alter or amend the judgment are DENIED.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 17 day of August, 1992.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona corporation; KALISPELL FEED AND GRAIN, INC., an Arizona corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually, Plaintiffs-Appellees, v. NORWEST BANK KALISPELL, N.A., A national banking corporation, et al., Defendant-Appellant.	No. 92-36713 D.C. No. CV-85-147-M-CCL ORDER (Filed Sept. 14, 1994)

Appeal from the United States District Court
for the District of Montana

Before: HUG, HALL, and THOMPSON, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b)

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

Supreme Court, U.S.
FILED
DEC 30 1994
OFFICE OF THE CLERK

No. 94-1056

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation, et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners acquiesced in the standard of review the Ninth Circuit applied in reversing the district court's denial of Respondent's motion for judgment as a matter of law:

   (i) By arguing on the merits that the district court's denial of Respondent's motion was not error when tested by the standard of review applied by the Ninth Circuit; and

   (ii) By failing to challenge the Ninth Circuit's standard of review in Petitioners' petition for rehearing, thereby depriving the Ninth Circuit of an opportunity to address Petitioners' contention that it applied an inappropriate standard of review.

2. Whether the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law was proper and consistent with Ninth Circuit and Supreme Court precedents.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Norwest Bank Kalispell, N.A., is a national association. Norwest Corporation is the direct owner of 97.15% of Norwest Bank Kalispell, N.A. Norwest Corporation is a Delaware corporation and a bank holding company.

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INTRODUCTION

Petitioners' Writ of Certiorari should be denied because the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law is consistent with the standard of review endorsed by this Court and applied by the other Circuits. The decision therefore did not create a conflict between the Circuits. In addition, the decision neither involved a federal question nor constituted a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Accordingly, the Petition for Writ of Certiorari should be denied. *See* Sup. Ct. R. 10.

STATEMENT OF THE CASE

Petitioners seek a Writ of Certiorari to challenge the Ninth Circuit's memorandum disposition[1] (Petitioners' Brief at A-1-10) reversing the judgment of the district court based upon its error in denying Respondent's motion for judgment as a matter of law on Petitioners'

[1] The Ninth Circuit's memorandum disposition was made pursuant to 9th Cir. R. 36-3 (Petitioners' Brief at A-3): "Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

two state law tort claims and award of attorney's fees to Petitioners. (Petitioners' Brief at A-4).

The Ninth Circuit applied the following standard of review:

> We review denial of a motion for judgment as a matter of law *de novo* to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992). Our role is the same as the district court's. *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399 (1992). A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. *Erickson*, 960 F.2d at 804. The evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in favor of that party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986). (Petitioners' Brief at A-4).[2]

In its Petition for Rehearing (Respondent's Brief at App. 1), Petitioners challenged the Ninth Circuit's memorandum disposition on the grounds that the Ninth Circuit:

> "(1) Overlooked a material point of law, which led it to ignore Plaintiffs' evidence of concealment of material fact; [and]

---

[2] This articulation of the standard of review is not substantively different than that applied by the district court (see Petitioners' Brief at A-12).

> (2) Created a conflict with another decision of this [Ninth Circuit] Court which was not addressed in the Panel's opinion." (Respondent's Brief at App. 4).

Petitioners' Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because Petitioners Acquiesced in the Ninth Circuit's Standard of Review.

Petitioners' principal merits challenge to the Ninth Circuit's memorandum disposition was evidentiary (Respondent's Brief at App. 13-17). That challenge concluded:

> "The jury's verdict, when based upon substantial evidence as it was here, *must* be given deference by this Court." (Respondent's Brief at App. 17) (emphasis in original).

Nowhere in Petitioners' Petition for Rehearing did they challenge the standard of review applied by the Ninth Circuit in reversing the district court's denial of Respondent's motion for judgment as a matter of law. Thus, Petitioners acquiesced in the standard of review applied by the Ninth Circuit, and may not now seek

certiorari on the ground that a different standard of review should have been applied.[3]

II. Certiorari Should Be Denied Because The Ninth Circuit's Standard of Review Was Proper.

The Ninth Circuit's memorandum disposition (Petitioners' Brief at A-4), as well as the *Coddington*[4] and *House of Stuart*[5] Ninth Circuit dispositions (see Petitioners' Brief at 11-12), relied on a common articulation of the Ninth Circuit's standard of review found in *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992).[6] The so-called "substantial evidence" standard is bottomed on the proposition that it "is error to deny a

---

[3] If a party chooses to file a petition for rehearing, Rule 40(a) requires that the petition raise each and every challenge to the decision in question. Fed. R. App. P. 40(a) (a petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present"). This interpretation of Rule 40(a) is consistent with considerations of judicial economy, as well as with the purpose of a petition for rehearing. *Martin Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906) (" . . . petitions for rehearing . . . are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors.") (citations omitted).

[4] *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. Lexis 1926 (9th Cir. Jan. 26, 1994), *cert. denied*, 63 U.S.L.W. 3262 (1994).

[5] *House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. Lexis 22199 (9th Cir. Aug. 15, 1994).

[6] It is worth noting that the unsuccessful certiorari petitions in *Erickson* and *Coddington* included challenges to the standard of review applied by the Ninth Circuit. (See *Erickson* Cert. Pet., p. 28 (issue 3), *Coddington* Cert. Pet., p. 11 (issue 1)).

judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." (*Id.*). The substance of that standard was applied by the district court (Petitioners' Brief at A-12) and the Ninth Circuit (Petitioners' Brief at A-4).

In the Ninth Circuit "substantial evidence" is not a quantitative concept. Instead it is based upon the Supreme Court's definition in *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938):

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

(Quoted in *Butte Copper & Zinc Co. v. Amerman*, 157 F.2d 457, 458 (9th Cir. 1946); see *Gordon Mailoux Inter. v. Fireman's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 741 (9th Cir. 1966)).

The Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) observed that the summary judgment standard of Fed. R. Civ. P. 56 (c) "mirrors the standard for a directed verdict" under Fed. R. Civ. P. 50(a):

> " . . . the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. [citation omitted] If reasonable minds could differ as to the impact of the evidence, however, a verdict should not be directed." (477 U.S. at 250-251).

The Supreme Court in *Anderson* went on to state the two "mirror" standards:

> " . . . the judge must ask himself not whether he thinks the evidence unmistakenly favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury reasonably could find for the plaintiff." (477 U.S. 252).

Applying such a standard of review, the Ninth Circuit concluded that the evidence at trial was "insufficient to support the finding of negligent misrepresentation" (Petitioner's Brief at A-4) and "insufficient to support his [Martin's] constructive fraud claim." (Petitioners' Brief at A-10).

CONCLUSION

A comparison of the articulations of the applicable standard of review in the pertinent Ninth Circuit decisions, the memorandum disposition here, and the Supreme Court's teachings in *Anderson* establishes the absence of any worthy issue for review by the Supreme Court in this case.

December 30, 1994

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-36713

JOHN W. MARTIN CONSTRUCTION COMPANY, INC. an Arizona Corporation, et al.,

Plaintiffs and Appellees,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Association,

Defendant and Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

On Appeal From the United States District Court
For the District of Montana

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INTRODUCTION

Plaintiffs deserve a rehearing because the Panel assigned to this case committed a gross error of law when it reversed Plaintiffs' jury verdict.

The Court:

(1) Overlooked a material point of law, which led it to ignore Plaintiffs' evidence of concealments of material fact;

(2) Created a conflict with another decision of this Court which was not addressed in the Panel's opinion.

In this case, the Panel held that constructive fraud could be premised only upon a false representation. Circuit Judge Hug, who sat on this Panel, also sat on the Panel which decided *In Re Mediscan Research, Ltd.*, 940 F.2d 558 (9th Cir. 1991). In that case, Circuit Judge Hug held that constructive fraud could be premised upon a false representation *or* upon concealments of material fact. The two decisions are, therefore, in direct conflict. Moreover, the Panel's mistake of law here runs contrary to the *agreed* jury instructions on the issue of constructive fraud submitted below, and contrary to the common and statutory law of Montana.

A rehearing *en banc* is necessary to correct the Panel's mistake, and to secure uniformity of intra-Circuit decisions. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987), *cert. denied* 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988) (Circuit Judge Hug participating); Rule 35(a), Federal Rules of Appellate Procedure.

Justice can be served only if this Petition and Suggestion for Rehearing *En Banc* is granted. If the members of

this Court will review the concealments of material fact ignored by the Panel, the Court will be astounded that this verdict was reversed.

STATEMENT OF THE CASE

For the benefit of those members of the Court who have no familiarity with this case, we briefly summarize the facts. For several years prior to 1981, Norwest Bank Kalispell (Bank) financed a feed and grain business owned by Lee Tower and known as Kalispell Feed and Grain Montana (KFG). By 1980, it was apparent KFG could not meet its debt obligations to the Bank. The KFG debt was entirely guaranteed by Farmers Home Administration (FmHA) and was secured by the KFG physical plant and equipment. KFG's inability to meet the debt load was troubling to the Bank, because the Bank was undersecured and considered the loan "bad". Tr. 99-100, 119. The evidence established that, had the Bank foreclosed at this time, it would have lost possibly $400-500,000. Tr. 130. Throughout 1980, FmHA advised the Bank to prepare liquidation plans and that foreclosure was imminent. Tr. 104, 216-217, 219-220; Exhibits 5, 6 and 13. In early 1981, John Martin, a building contractor from Arizona, entered the picture and expressed an interest in acquiring KFG for investment purposes only. Tr. 128-129, 162.

A series of negotiations between and among Martin, Tower and Norwest Bank ensued. These negotiations, and the critical material that the Bank withheld from Martin during negotiations, provide the framework for Martin's cause of action for constructive fraud.

Tower told the Bank to give Martin whatever information Martin needed. Tr. 247-248, 345. Tower then took a "back seat" in the negotiations and the Bank handled the transaction from that point forward. Tr. 251. In April of 1981, after he had acquired what he believed to be all the relevant information on the business within the Bank's knowledge, Martin agreed with the Bank to assume all of Tower's outstanding obligations. Tr. 248, 345 and 441. Martin also personally guaranteed the loans, and pledged significant collateral – his two personal homes – to secure the loans. Tr. 497-498. With Martin and his collateral on the line, the Bank was fully secured in the event of a loss. Tr. 130, 165 and 336.

Two years after Martin's acquisition of KFG, the Bank pulled Martin's line of credit, knowing this would topple the business. Tr. 166, 338-342. Martin injected nearly $700,000 cash trying to keep the business afloat before the Bank eventually foreclosed. Tr. 508, Exhibit 46. Martin sued the Bank for constructive fraud and negligent misrepresentation, and the Bank counterclaimed to collect the amounts owing under the Tower notes and guarantees that Martin had assumed in April of 1981.

In March of 1992, Martin's case was tried to a jury with the Honorable Charles L. Lovell, presiding. The jury found that Norwest Bank had engaged in negligent misrepresentation and constructive fraud in its dealings with Martin. District Judge Charles L. Lovell, in a strongly worded opinion, affirmed the jury's verdict when he denied the Bank's motion for judgment as a matter of law. (In fact, Judge Lovell had even permitted punitive damages to be submitted to the jury, but the jury declined to award them.)

The jury awarded Martin sufficient monies to satisfy or cancel out his obligations to the Bank, which, by 1992, totalled in excess of $2.8 million. In addition, the jury awarded compensatory damages representing Martin's investment in the failing business, and damages for emotional distress. On appeal, the Panel reversed and remanded the district court's verdict on the basis of insufficiency of the evidence, and directed the district court to enter judgment on behalf of the Bank.

ARGUMENT

The Panel dedicated only one page of its brief Memorandum opinion to plaintiffs' case for constructive fraud. The Panel summarily concluded:

> Because Martin failed to prove that Norwest made false representations, the evidence was insufficient to support his constructive fraud claim, and Norwest's motion [for judgment as a matter of law] should have been granted. Memorandum, p. 8.

The Panel's mistake of law caused it to ignore the agreed jury instructions on constructive fraud, as well as all of plaintiffs' evidence establishing concealments of material fact. The constructive fraud equation does not *require* a false representation. It is firmly established in Montana and this Circuit that omissions or concealments of material fact can form the basis of constructive fraud.

In the case of *In Re Mediscan Research, Ltd, supra*, a Panel of this Court, which included Circuit Judge Hug, *affirmed* the finding of constructive fraud entered by the Bankruptcy Appellate Panel. The appellant argued that

the finding of fraud should not stand because there was no evidence of any affirmative misrepresentations of fact. This Court disagreed, stating at pages 562-563:

> GE&T mischaracterizes the bankruptcy court's holding. The court found that GE&T actively participated in and assisted in defrauding and concealing the truth from Mediscan's limited partners. Thus, the fact that the officers of GE&T themselves did not make affirmative misrepresentations to the limited partners does not undermine the bankruptcy court's finding.
>
> In California, the intentional concealment of a material fact is an alternative form of fraud equivalent to direct affirmative misrepresentation. [*Citations omitted.*] . . . Under the California Civil Code, GE&T committed actual fraud by aiding APC in concealing material facts from the limited partners.

This Court upheld the common law of California, and affirmed that constructive fraud was properly premised upon the concealment of a material fact. In Montana, as in California, the concealment or omission of a material fact is also an alternative form of fraud equivalent to an affirmative misrepresentation.

Since this Court and Circuit Judge Hug upheld California's law and permitted omissions of fact in that State to form the basis of constructive fraud, this Court must afford the law of Montana the same deference. Plaintiffs' claim of constructive fraud must be analyzed in terms of omissions and concealments of material fact, and not solely on the basis of false representations, as the Panel did here.

The stipulated instructions given below on constructive fraud were:

> Constructive fraud consists of any breach of duty which without an actually fraudulent intent gains an advantage to the other person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him. Constructive fraud occurs when a party to a transaction conceals from the other party material facts about the nature of the transaction.
>
> One who misleads another with intent to induce him to alter his position to his injury or risk is liable for any damages which he thereby suffers. Except as I will instruct you, where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose known facts.
>
> A duty to disclose known facts arises where a party having knowledge of the facts is in a fiduciary or confidential relationship which imposes on him a duty of disclosure or where there are special circumstances. Neither KFG Arizona, Martin Construction, or the Martins had a fiduciary or confidential relationship with Norwest Bank.
>
> Plaintiffs cannot recover against Norwest Kalispell for constructive fraud unless they show that special circumstances existed which imposed on Norwest Kalispell a duty to disclose material facts which were not disclosed.
>
> Special circumstances creating a duty to disclose material facts which were not disclosed would

exist if Norwest Kalispell by its words or conduct created a false impression concerning serious impairments or other important matters regarding the financial condition or business of KFG Montana.

In order to establish a claim for constructive fraud, Plaintiffs have the burden of proving all of the following elements by a preponderance of the evidence:

(1) Norwest Kalispell by its words and conduct created in Plaintiffs a false impression concerning serious impairments or other important matters regarding the financial condition or business of KFG Montana.

(2) Plaintiffs did not know and had no reason to suspect the truth regarding such serious impairments or other important matters regarding KFG Montana.

(3) Norwest Kalispell failed to disclose information necessary to correct the false impression it had created concerning serious impairments or other important matters regarding KFG Montana.

(4) Norwest Kalispell gained a pecuniary advantage by its failure to disclose the information necessary to correct the false impression it had created concerning serious impairments or other important matters regarding KFG Montana.

(5) Through Norwest Kalispell's failure to disclose relevant information about KFG Montana, that Plaintiffs were justifiably induced to act or refrain from acting in a way they would not have if they had not had a false impression; and,

(6) Plaintiffs, as a result, sustained damage.

Tr. 992, L. 16 through Tr. 994, L. 23. No error was predicated on these instructions.

Norwest Bank's tendered instructions on constructive fraud were virtually identical to the instructions the court eventually gave. In support of its instructions, the Bank cited several Montana cases, as well as Section 551 of the Restatement of Torts, Second, as authority. The first case cited by Norwest in support of its instructions was *Moschelle v. Hulse*, 622 P.2d 155 (Mont. 1980). There, the Montana Supreme Court said:

> The defendants' statements cannot be excused simply because deliberate misstatements may not have been proven. The facts indicate a pattern of repeated concealments of the true state of affairs concerning the condition of the premises and probable business earnings. Withholding relevant facts concerning purchased property can be a fraudulent act. *See, Russell v. Russell* (1969), 152 Mont. 461, 452 P.2d 77. Furthermore, where a vendor by his conduct or words creates a false impression concerning a matter of vital importance to the purchaser, full disclosure of relevant facts may be required . . .
>
> Under the facts here, the defendants were under a duty to made [sic] such disclosures as would erase the false impressions created in the minds of the plaintiffs . . . *Id.* at 159.

The defendant also cited *Poulsen v. Treasure State Industries Inc.*, 626 P.2d 822, 829-830 (Mont. 1981), wherein the Supreme Court held that constructive fraud can be premised upon the withholding of information that a seller had about the business, which the buyer had no

reason to suspect. *Id.* at 828. In accord with *Poulsen* and *Moschelle, supra,* are *Mends v. Dykstra,* 637 P.2d 502, 506-509 (Mont. 1981), *Drilcon, Inc. v. Roil Energy Corporation, Inc.,* 749 P.2d 1058, 1061-1062 (Mont. 1988), and *Kitchen Krafters, Inc. v. Eastside Bank,* 789 P.2d 567, 573-574 (Mont. 1990), all of which were cited by Norwest Bank in support of its constructive fraud instructions. These cases hold that the giving of misleading information or half-truths, or the creation of a false impression concerning serious impairments of the business at issue, can constitute grounds for constructive fraud. It was from these cases that the agreed jury instruction on constructive fraud was gleaned.

The Montana Supreme Court recently reaffirmed these principles. In *Chor v. Piper, Jaffray & Hopwood Inc.,* 862 P.2d 26, 31 (Mont. 1993), the Montana Supreme Court stated:

> A prima facie case of actual fraud or constructive fraud would require, among other elements of proof, evidence that Piper misrepresented *or* omitted some material fact . . . In order for an omission, rather than an affirmative misrepresentation, to constitute fraud, the plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue. (Emphasis supplied.)

The foregoing case law – of Montana and this Circuit – demonstrates the clear error of the Panel's conclusion that only false representations can support a verdict of constructive fraud.

The jury was instructed that "special circumstances" could create a duty to disclose material facts if the Bank,

by its words or conduct, created a false impression concerning serious impairments or other important matters regarding the financial condition of KFG. Jury Instruction, paragraph 5. The parties below agreed that this question was one of fact to be resolved by the jury. The jury resolved that fact question in favor of Martin, finding that special circumstances existed which imposed on the Bank a duty to disclose material facts. No doubt the jury took into account the Bank's admission that this was not a typical lender-borrower situation. (Testimony of Bank Vice President Grell, Tr. 159-160.) Here, the Bank needed Martin to save it from a significant loss when the time came to foreclose on KFG. It used Martin to "shore up" its poor security position. (Testimony of Bank President Olson, Tr. 336).

THE MATERIAL FACTS WHICH WERE NOT DISCLOSED

Although the jury heard a lot of evidence which could support its verdict, two exhibits clearly establish the Bank's constructive fraud. Exhibit 42 was Bank President Olson's Letter of Intent of February 6, 1981. This letter was written with the understanding it would be given to Martin. Tr. 317. In this letter, the Bank indicated:

(a) That it would continue to pursue an $810,000 FmHA guaranteed loan which Martin could utilize once he acquired the business;

(b) That KFG could be viable, under proper conditions;

(c) That KFG could show a profit; and,

(d) That KFG needed a $500,000 capital injection.

Three weeks after Martin was given this letter, the Bank received bad news from the FmHA. On February 27, 1981, the FmHA advised the Bank:

(a) An $810,000 loan would not be extended, because KFG would still not have sufficient capital to sustain projected growth;

(b) KFG has not generated enough money to service such a load of term debt, and projections are completely unsupported historically, or by new evidence;

(c) KFG will never do what it has " . . . historically never done, that being to increase volume and profit to the point that it might sustain itself."

See, Exhibit 28. Bank Vice President Grell **admitted** at trial that this letter meant the FmHA's previous denial of the $810,000 loan application would stand. Tr. 137-140.

Exhibit 28 established two things: (1) that the FmHA would not extend the guaranteed loan that the Bank was assuring Martin it would continue to pursue, and, (2) the FmHA firmly believed that this business would *never* be viable. These dire observations directly contradicted the assurances contained in Exhibit 42, the Letter of Intent. Moreover, these dire observations proved prophetic.

The Bank chose never to tell Martin about Exhibit 28 or its contents. In March of 1981, a couple of weeks after it had received Exhibit 28, three Bank officers met with Martin. Knowing full well that the FmHA loan application for $810,000 would never be approved, the Bank

handed Martin an application for an $810,000 FmHA guaranteed loan, and assured him that approval of the loan would be coming soon, after Martin was on board. Tr. 492-494. Later, during subsequent meetings, the Bank advised Martin it would need to take mortgages on his two homes to secure his personal guarantees. Martin was assured, however, that these mortgages on his homes in Missoula and Phoenix would be temporary *only*, and would be released as soon as the FmHA loan came through. Tr. 503-504. These mortgages, in fact, were so important to the Bank that one of the bankers flew to Phoenix to evaluate Martin's Phoenix home and secure Martin's signature on the mortgages. Tr. 505-506. The Bank gave Martin the assurance that these mortgages were only temporary, all the while knowing that they would be permanent because the FmHA loan would never come through. Tr. 503-504, Exhibit 28.

The jury heard the Bank officers' pathetic attempts to explain why Exhibit 28 and other negative correspondence and comments between the Bank and the FmHA were not shared with Martin. (Martin did not discover these documents until 1989, after the Court issued a subpoena duces tecum.) One officer testified that the Bank couldn't release these documents to Martin because Martin was not a Bank customer. Tr. 162. He said the material was "a private matter." Tr. 155-156. When challenged, though, Bank President Olson admitted that Tower had indeed told the Bank to give Martin everything that it had. Tr. 345. Finally, during the Bank's case, Bank President Olson testified that the reason the Bank didn't give Martin the FmHA material was because Martin hadn't asked for it! Tr. 385-386. The jury was left to

wonder how Martin could have known to ask for the material when he never knew it existed.

Martin pledged his homes only on the Bank's express assurance that the mortgages were temporary. Tr. 503. Martin went into the transaction with the assurance that the FmHA loan would come through, once he was the business owner. He also went into the transaction equipped with the Bank's assurances that the business could be viable and could show a profit – assurances the Bank knew to be wrong.

There was much more evidence of concealments on the part of the Bank, but space constraints prevent a further examination of the evidence. This evidence alone, however, supports the verdict for constructive fraud. Each of the six elements of constructive fraud upon which the jury was properly instructed are clearly present:

(a) The Bank created a false impression regarding serious impairments concerning the financial condition of KFG (representations of viability, profitability, and financing);

(b) Martin did not know of the negative information from the FmHA because the Bank did not tell him it even existed;

(c) The Bank received information which was necessary to correct the false impression created by its letter of intent, but the Bank chose not to disclose it;

(d) The Bank gained a pecuniary advantage by failing to disclose the information necessary to correct the false impressions;

(e) Martin was justifiably induced to act in a way he would not have acted had he not had the false impression; and,

(f) Martin, as a result, sustained damage.

This case hinged upon the credibility of the witnesses. The jury found the credibility of the Bank witnesses lacking, as did the trial judge who affirmed the jury's verdict. The credibility of the witnesses and the weight of the evidence are issues for the jury to resolve. These issues are generally not the proper subject of appellate review. *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992). The jury's verdict, when based upon substantial evidence as it was here, **must** be given deference by this Court.

We urge this Court to apply the proper law on constructive fraud – the same law upon which the jury below was instructed – to the facts of this case. If that is done, only one conclusion can be reached. That conclusion is that the plaintiffs' verdict must be affirmed.

CONCLUSION

Martin respectfully requests that this Court grant a rehearing *en banc*, that the Court vacate the Panel's opinion, and that the Court affirm the jury verdict. In the alternative, if the Court has some uncertainty about Montana's law on constructive fraud, the plaintiffs urge this Court to certify the question on constructive fraud to the Supreme Court of the State of Montana.

Respectfully Submitted this 2nd day of May, 1994.

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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of May, 1994, I mailed two true and correct copies of the within and foregoing Appellees' Petition for Rehearing with Suggestion for Rehearing *En Banc*, postage prepaid, to each of the following counsel:

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(3)

No. 94-1056

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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DISCUSSION

I. The Questions Whether the Ninth Circuit Applied a Correct Standard of Review are Properly Before this Court.

Martin's Petition presents two closely related questions regarding the standard of review applied by the Ninth Circuit: (1) whether the standard, itself, is improper; and (2) whether the Court of Appeals erred in its application of the standard. Both questions address the relationship between the Seventh Amendment and the reviewing court's appropriate role in deciding a post-jury verdict motion for judgment as a matter of law. Contrary to the Bank's argument in its Brief In Opposition, these questions are properly before this Court.

In his Brief to the Ninth Circuit, Martin set forth the following standard of review:

> The verdict of the jury must be given considerable deference. This Court may reverse the District Court only if it finds that the evidence and all of its inferences, when considered as a whole and viewed in the light most favorable to Martin and KFG, can support only one reasonable conclusion, that being that the Bank is entitled to judgment notwithstanding the verdict. *Kern v. Levolor Lauritzen, supra* [899 F.2d 772, 775 (CA9 1990)].
>
> This Court will not re-weigh the evidence, nor may it select one inference over the inference chosen by the jury. *Cockrum v. Whitney*, 479 F.2d 84 (9th Cir. 1973). Where there is conflicting testimony on a material issue, this Court must leave the resolution of that conflict to the jury. The right to determine the credibility of a witness lies at the core of the jury's fact-finding function. *Bilbrey By Bilbrey v. Brown*, 738 F.2d 1462, 1468 (9th Cir. 1984).

Brief of Appellees, dated Oct. 20, 1993, at pp. 19-20. This is substantively the same standard as that applied by the district court. *See* Petition for Certiorari at A-12. Martin did not rely upon or brief the Ninth Circuit's substantial evidence standard of review under *Erickson v. Pierce County*, 960 F.2d 801, 804 (CA9), *cert. denied*, 113 S.Ct. 815 (1992).

Martin presented the appropriate standard of review to the Ninth Circuit, and did not invite it to apply the incorrect, substantial evidence standard. Thus, Martin properly afforded the court below the opportunity to avoid its error. Having done so, he may petition this Court to correct that error.[1]

Moreover, in petitioning for rehearing, Martin did take the Ninth Circuit to task for overstepping its proper role in reviewing the jury's verdict:

> If the members of this Court will review the concealments of material fact *ignored by the Panel*, the Court will be astounded that the verdict was reversed. (Respondent's Brief at App. 4-5 [emphasis added].)
>
> * * *
>
> This case hinged upon the credibility of the witnesses. The jury found the credibility of the Bank witnesses lacking, as did the trial judge who affirmed the jury's verdict. The credibility of the witnesses and the weight of the evidence *are issues for the jury to resolve. These issues are generally not the proper subject of appellate review.* [Emphasis added.] The jury's verdict, when based upon substantial evidence as it was here,

---

[1] Martin could have petitioned for certiorari without first seeking rehearing below. Had he done so, the Bank could not credibly argue that Martin "acquiesced" in the substantial evidence standard of review.

must be given deference by this Court. (Respondent's Brief at App. 17.)

Though Martin did not *per se* articulate a challenge to the Ninth Circuit's substantial evidence standard in petitioning for rehearing, that question is "fairly included" within his challenge below to the panel's wrong approach and decision. *Cf.* SUPREME COURT RULE 14.1(a). This Court may, and should, grant Martin's petition for a writ of certiorari to review the important questions presented.

II. The Ninth Circuit's Standard of Review Was Not Correct.

Martin established in his petition for certiorari that federal courts apply differing and inconsistent standards of review in post-verdict motions for judgment as a matter of law. The *Erickson* substantial evidence test as applied here and in other recent cases in the Ninth Circuit is notably less deferential than the standards articulated by this Court in previous cases, and applied by other circuits.[2] Justice White, in referring to this unsettled issue, aptly noted that the " . . . disagreement among the Federal Courts of Appeal is of far more than academic interest." *Schwimmer v. Sony Corporation*, 459 U.S. 1007, 1009 (1982) (Opinion of White, J., respecting denial of certiorari). *See also* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2526 (1971).

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[2] The Bank suggests the denials of certiorari in *Erickson* and *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. LEXIS 1926 (CA9 Jan. 26, 1994), *cert. denied* 63 U.S.L.W. 3262 (1994) support denial of certiorari here. (Brief in Opposition at 4, n. 6.) To the contrary, this Court's guidance is particularly appropriate in light of the Ninth Circuit's continuing and repeated application of an incorrect standard of review to reverse judgments entered on jury verdicts. *See also House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. LEXIS 22199 (CA9 Aug. 15, 1994).

The Bank does not point to any authorities from this Court, under Rule 50, which settle these issues. This is not surprising because no recent authorities exist.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), a case addressing the proper role of the trial court in deciding a summary judgment motion in a libel case, does not resolve the issue. First, even conceding parallels between the standards under Rule 56 and 50(a) (pre-submission motion), this Court should grant review to provide guidance on the appropriate deference to be accorded a jury's determination by a reviewing court on a post-verdict motion under Rule 50(b).

Second, the Ninth Circuit's substantial evidence test differs from the standard of review articulated in *Anderson*, even if that standard applies to a Rule 50(b) motion. The Bank argues, in essence, that it is a matter of mere semantics; the standards applied by the district court, the Ninth Circuit, and in *Anderson* are all substantively the same. (Brief in Opposition at 4-6.) This is not so.

As articulated, and as applied, the Ninth Circuit's standard begins by *questioning* and *examining* the validity of the jury's verdict: "We review . . . to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, ... A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." (Petition for Certiorari at A-4). In other words, the reviewing court says, "Judgment as a matter of law will be *granted* unless the verdict is supported by substantial evidence."

In contrast, the standard briefed by Martin and applied by the district court begins by *accepting* and *deferring* to the jury's verdict: A motion for judgment as a matter of law will be granted only " 'if the evidence construed in the light most favorable to the nonmoving party permits *only one* reasonable conclusion as to the verdict and that conclusion is contrary to the jury's' and must [be denied] 'if reasonable minds could differ over

the verdict.' " (Petition for Certiorari at A-12 [citations omitted and emphasis added]). *Cf. Anderson v. Liberty Lobby, supra,* 477 U.S. at 250 ("If reasonable minds could differ . . . a verdict should not be directed."). In other words, the reviewing court says, "Judgment as a matter of law will be *denied* unless a jury could not reasonably have arrived at the verdict."

The Ninth Circuit's substantial evidence standard of review presumes the verdict is vulnerable. The proper standard presumes the verdict is valid, and will not be set aside if reasonable minds could differ over the verdict.

These are not matters of mere semantics, as the Bank argues. They are substantive and significant distinctions that directly impact litigants' Seventh Amendment rights. This Court should grant review to provide appropriate guidance and instruction to lower courts including, in particular, the Ninth Circuit.

CONCLUSION

This case presents important questions that warrant Supreme Court review. The petition for a writ of certiorari should be granted.

Respectfully submitted this 11th day of January 1995,

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